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Supreme Court, U.S.

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No. 93-986

IN THE  
SUPREME COURT OF THE UNITED STATES

October Term, 1993

MARGARET McINTYRE,

*Petitioner,*

v.

OHIO ELECTIONS COMMISSION,

*Respondent.*

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Petition for a Writ of Certiorari  
to the Supreme Court of Ohio

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BRIEF IN OPPOSITION TO PETITION  
FOR A WRIT OF CERTIORARI

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## **QUESTION PRESENTED**

Is Ohio Revised Code §3599.09(A), an election statute that has been construed by the Ohio Supreme Court to have the salutary purpose of deterring fraud, false advertising and libel, unconstitutional because it can be applied to anonymous campaign literature?

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## REASONS FOR DENYING THE WRIT

### I. THIS CASE IS NOT A PROPER VEHICLE FOR TESTING THE CONSTITUTIONALITY OF OHIO REVISED CODE §3599.09(A).

The success of McIntyre's petition for certiorari depends on her arguments that 1) this Court's decision in *Talley v. California*, 362 U.S. 60 (1960), prohibits any proscription on anonymous speech, and 2) that "[t]he Ohio Supreme Court's decision in this case in refusing to follow *Talley v. California*, [362 U.S. 60 (1960)], is generating a serious conflict of legal authority." Petition for Certiorari at 20. Neither contention, however, is correct. Consequently, the petition for certiorari should be denied.

#### A. The Decision Below Is Not Inconsistent With This Court's Decision In *Talley v. California*.

In *Talley*, the Court invalidated legislation that "apparently had as its only purpose the identification of the author of . . . handbills." *McIntyre v. Ohio Elections Commission*, 67 Ohio St.3d 391, 394, 618 N.E.2d 152, 154 (1993). The *Talley* Court had no occasion to "pass on the validity of an ordinance limited to preventing [fraud, false advertising and libel]." *Talley*, 362 U.S. at 64.

In the case below, the Ohio Supreme Court established as the purpose of Ohio Rev. Code §3599.09(A) the identification of persons "responsible for fraud, false advertising and libel." *McIntyre* 67 Ohio St. 3d at 394, 618 N.E.2d at 154. Thus, rather than conflicting with *Talley*, the decision below addresses a subject *never* considered by the Court in *Talley*. As a result, there is no friction between *Talley* and the decision below.

#### B. There Is No Conflict Between The Decision Below And Cases Cited In The Petition For Certiorari.

McIntyre cites several cases that she contends are in conflict with the decision below. See *Wilson v. Stocker*, 819 F.2d 943 (10th Cir. 1987); *Illinois v. White*, 116 Ill. 2d 171, 506 N.E.2d 1284 (1987); *Schuster v. Imperial County Municipal Court*, 109 Cal. App. 3d 887, 167 Cal. Rptr. 447 (1980), cert. denied, 450 U.S. 1042 (1981); *State of North Dakota v. North Dakota Education Association*, 262 N.W.2d 731 (1978); *State of Louisiana v. Fulton*, 337 So. 2d 866 (1976); *Commonwealth of Massachusetts v. Dennis*, 368 Mass. 92, 329 N.E.2d 706 (1975); *State of New York v. Duryea*, 76 Misc. 2d 948, 351 N.Y.S.2d 978 (1974); *State of Idaho v. Barney*, 92 Idaho 581, 448 P.2d 195 (1968). But a review of these cases reveals that each dealt with "a legislative prohibition on all anonymous campaign literature," *Schuster*, 109 Cal. App. at 899, 167 Cal. Rptr. at 453 (emphasis added), regardless of whether fraud was involved. Because Ohio Rev. Code §3599.09(A), as interpreted by the Ohio Supreme Court, the final arbiter of the meaning of Ohio law, is limited to prohibiting "fraud, false advertising and libel," *McIntyre*, 67 Ohio St. 3d at 394, 618 N.E.2d at 154, there is no conflict between these cases, at least in regard to McIntyre's facial challenge to Ohio Rev. Code §3599.09(A).

**C. It Is Unclear From The Decision Below Whether A Finding Of Fraud Was Made By The Ohio Supreme Court.**

The only question remaining before this Court, therefore, is whether Ohio Rev. Code §3599.09(A) was applied constitutionally to McIntyre's conduct. And, quite frankly, even if this Court chooses to accept a case that presents a factual, rather than a legal question, it is unclear from the decision below whether or not a finding of fraud was a predicate to holding McIntyre responsible for violating Ohio Rev. Code §3599.09(A).

Pursuant to the transcript from the administrative hearing before the Ohio Elections Commission ("OEC"), the following exchange occurred between McIntyre and Michael Igoe, a member of the OEC:

McIntyre: . . . I was working as an individual citizen, not a committee, not as a group; therefore, I didn't need to file anything.

Igoe: Except you didn't identify yourself as an individual; you identified yourself as a group.

This dialogue demonstrates that there was evidence before the OEC to support the conclusion that McIntyre, by identifying as the circulators of her literature "Concerned Parents and Taxpayers," attempted to mislead voters as to the source of the information. Unfortunately, the order issued by the OEC finding that McIntyre violated Ohio Rev. Code §3599.09(A) is silent as to the basis for the OEC's finding.

Both the OEC transcript and order were part of the administrative record before the Ohio Supreme Court when it considered McIntyre's case. The Ohio Supreme Court, however, makes no reference in its opinion to the OEC transcript.

Of course, it cannot be assumed that the court below was unaware of the exchange between McIntyre and Commissioner Igoe. To the contrary, it should be presumed that the Ohio Supreme Court was familiar with the entire record before it. Nevertheless, based on the language of the decision below, it is unclear whether the Ohio Supreme Court considered this evidence. And without a clear statement demonstrating that the court below determined McIntyre violated Ohio Rev. Code §3599.09(A) irrespective of a finding of fraud, this Court should not expend any of its limited time to hear a case that even under McIntyre's interpretation of the law might have been correctly decided. This case, therefore, is not an appropriate vehicle for deciding the issues presented and McIntyre's petition for a writ of certiorari should be denied.



**II. OHIO REVISED CODE §3599.09(A) DOES NOT VIOLATE THE RIGHT TO FREEDOM OF SPEECH AND EXPRESSION GUARANTEED BY THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION.**

**A. Ohio Revised Code §3599.09(A) is Constitutional Under The Balancing Test For State Election Laws Established By This Court in *Anderson v. Celebrezze* And *Burdick v. Takushi*.**

As noted earlier, *Talley v. California* does not control the outcome of this case. Consequently, this Court must look elsewhere in order to resolve the controversy between the parties.

The State of Ohio, like all states, must regulate elections in order to promote democracy and to preserve integrity in the electoral process. "As a practical matter, there must be a substantial regulation of elections if they are going to be fair and honest and if some order, rather than chaos, is to accompany the democratic processes." *Storer v. Brown*, 415 U.S. 724, 730 (1974).

Ohio Rev. Code §3599.09(A) is an election regulation statute. McIntyre's contention that Ohio Rev. Code §3599.09(A) is not an election regulation statute is refuted both by the inclusion of Ohio Rev. Code §3599.09(A) in the portion of the Ohio Revised Code devoted to elections, and the close relationship between Ohio Rev. Code §3599.09(A) and two other statutes, Ohio Rev. Code §3599.091(B)(2)-(10) and Ohio Rev. Code §3599.092(B)(2), which McIntyre concedes are election regulations.

Recently, in *Burdick v. Takushi*, 112 S.Ct. 2059 (1992), the Court stated that to subject every election statute to strict scrutiny and to require that the regulation be narrowly tailored to advance a compelling state interest "would tie the hands of states seeking to assure that elections are operated equitably and efficiently." 112 S.Ct. at 2063. Thus,

"[c]onstitutional challenges to specific provisions of a State's election laws therefore cannot be resolved by any 'litmus-paper test' that will separate valid from invalid restrictions". *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983) (quoting *Storer*, 415 U.S. at 730)

Rather than applying a rigid test for evaluating challenges to state election laws,

A Court considering a challenge to a state election law must weigh "the character and magnitude of the asserted injury to the rights protected by First and Fourteenth Amendments that the plaintiff seeks to vindicate" against "the precise interests put forward by the State as justifications for the burden imposed by its rule," taking into consideration "the extent to which those interests make it necessary to burden the plaintiff's rights." *Id. Celebrezze*, 460 U.S. at 789.

Under this standard, the rigorousness of our inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights. Thus, as we have recognized when those rights are subjected to "severe" restrictions, the regulation must be "narrowly drawn to advance a state interest of compelling importance." *Norman v. Reed*, 502 U.S. \_\_\_, \_\_\_, 112 S.Ct. 695, 705 (1992). But when a state election law provision imposes only "reasonable, nondiscriminatory restrictions" upon the First and Fourteenth Amendment rights of voters, "the State's important regulatory interests are generally sufficient to justify" the restrictions.

112 S.Ct. at 2063-4 (citations omitted). Under *Anderson v. Celebrezze* and *Burdick v. Takushi*, therefore, this Court must first assess the "character and magnitude of the asserted injury" Ohio Rev. Code §3599.09(A) allegedly imposes on

those who are responsible for the distribution of publications advocating the defeat or passage of ballot issues.

**1. Ohio Rev. Code §3599.09(A) Does Not Impose A Severe Burden On First Amendment Rights.**

Although Ohio Rev. Code §3599.09(A), like all election regulations, has an impact on First Amendment rights, the statute does not unconstitutionally restrict the opportunities for free expression. Distributing political literature promoting the passage or defeat of an issue is not the only avenue for free expression. Ohio Rev. Code §3599.09(A) does not prevent persons from engaging in door-to-door campaigning, making speeches, participating in debates, or appearing on public access television.

More importantly, there is nothing in the record to indicate that the disclaimer requirement does in fact substantially inhibit political expression. Indeed, political activity in Ohio is vigorous. Few seem deterred from this activity by concern that they must take responsibility for their actions and statements.

In particular, McIntyre fully enjoyed her freedom of speech. On at least two separate occasions she distributed school levy literature. She was free to do so and was not prohibited from attending the school meetings to make the distribution or to vocalize her position both inside and outside the school meetings. Thus, McIntyre was not punished because of the substance or content of her expression. For these reasons, McIntyre's contention that she was punished for the communication of a classic political viewpoint is false.

Given these facts, it must be concluded that Ohio Rev. Code §3599.09(A) did not severely restrict McIntyre's First Amendment rights. Any burden imposed on those rights by the statute is marginal. Furthermore, the statute's limited burden is nondiscriminatory and politically neutral because it neither prohibits the communication of ideas nor attempts to regulate the content of expression.

**2. The State Of Ohio Has Appropriate Interests In Deterring Fraud, False Advertising and Libel In Elections, And In Promoting An Informed Electorate.**

The next step in the *Anderson* and *Burdick* analysis is to evaluate the interests put forward by the state as justifications for the burden imposed by the statute. According to the Ohio Supreme Court, the purpose of Ohio Rev. Code §3599.09(A) is to prevent "fraud, false advertising and libel." 67 Ohio St. 3d at 394. This purpose is particularly laudable in this age of negative, attack-style politics.

Moreover, in *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765 (1978), the Court identified another legitimate state purpose underlying statutes such as Ohio Rev. Code §3599.09(A): "the people in our democracy are entrusted with the responsibility for judging and evaluating the relative merits of conflicting arguments. They may consider, in making their judgment, the source and the credibility of the advocate." *Bellotti*, 435 U.S. at 791-92. In footnote 32 of its opinion, the Court stated that in the case of corporate advertising, identification of the source of advertising may be required as a means of disclosure, so that the people will be able to evaluate the arguments to which they are being subjected. *Id.* The Court's rationale for mandatory disclosure in the case of corporate advertising was that, unlike some methods of participation in political campaigns, corporate advertising is likely to be highly visible. *Id.*

There is no question that corporations have the resources to be highly influential in the political process. Nevertheless, it is simply incorrect to assume that only corporations or political parties are visible enough in the political process to be subject to mandatory disclosure requirements. Individuals or groups of citizens conducting their own campaigns by designing literature and distributing it in a neighborhood or at public assemblies also can have a major impact on an election. The disclosure requirement of R.C. §3599.09(A) ensures that those responsible for the distribution of campaign literature are held accountable to



the public in order to encourage responsible campaigning. It also ensures that voters will have sufficient information to make an informed choice.

Preventing fraud in elections and facilitating the public's ability to consider the credibility of sources, the two legitimate state interests advanced by Ohio Rev. Code §3599.09(A), outweigh the limited burden imposed on political activity by Ohio Rev. Code §3599.09(A). The prohibition of Ohio Rev. Code §3599.09(A), when considered as part of the electoral process, therefore, does not impose an unconstitutional burden upon the First Amendment rights of individuals such as McIntyre.

## CONCLUSION

For the preceding reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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